Personal knowledge of a judge as a source of proof: An Islamic perspective

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Abstract:
Islam has given pivotal role to the judiciary and considers it one of the most important pillar of the state. In this regard, the role of a judge is also of great importance as justice cannot be dispensed in society without the contribution of a judge. When a dispute is brought to a court, it becomes the responsibility of the judge to provide justice to the parties. A judge relies on testimony, oath and circumstantial evidences as sources of proof. Jurists have discussed them in detail while they have also discussed personal knowledge of a judge (Ilm al-Qadi) as a source of proof. This article focuses on it, where different stipulations and conditions, as laid down by the jurists, have been discussed along with their arguments.

Introduction:

A judge plays an important role in the dispensation of justice. This is why Islam has laid down clear injunctions about the appointment of a qadi (judge). Islamic history tells us that all Muslim rulers appointed judges for deciding disputes amongst the people. In fact, this appointment was not merely an administrative step, but it was fulfilling the injunctions of Islam as well.

A famous jurist al-Mawardi says: "To entrust someone with the work of Qadha is obligatory for the ruler as it is a part of his general duties and powers." [1]

However, the position of a judge is very sensitive, the Prophet (PBUH) said:

"*He who is entrusted with the function of Qadha is slaughtered without knife."* [2]

On another occasion he said:

"Qudat (judges) are of three categories; one of whom will go to paradise and two to Hell. The one who will go to Paradise is the man who knows what is right and gives judgment accordingly. But the man who knows what is right and

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acts tyrannically in his judgment will go to Hell. The man who gives judgment for people when he is ignorant will (also) go to Hell. "[3]

Responsibilities of a judge:

In this regard the letter of Hazrat Umar RA to Abu Mosa al Ashari RA is of great importance as it gives a clear picture of the code of procedure for a judge. It is reproduced here, as it will provide a base for our discussion.

"*Verily, Qada is a firm obligation and a followed path and practice. Understand when a disputed matter is put up to you because to pronounce a just verdict without its implementation is of no use. Consider all the people (and disputing parties) equal in your presence (attention), assembly (court) and judgment, so that a man of high position may not cherish hope that you will do injustice, and so that the weak may not be in despair regarding your justice. (The onus of) proof is on him who alleges or claims, and (the onus of) oath on him who denies. Compromise amongst the Muslims is lawful; except that which makes a lawful prohibited, and render the prohibited lawful. He who claims on the strength of an absent evidence, fix a time-limit for him; if he brings his evidence within the stated period, grant him his right, if he deserves; if he fails to do so, reverse upon him the judgment,. This is the last plea and the utmost clarity that dispels the darkness. Prevent you not your yesterday's judgment that you have reconsidered afterwards in your conscience and are guided aright, to revert to the right judgment because right is established (of old); and nothing annuls what is right, because it is better to return to right than to continue in wrong. Evidence of all the Muslims is admissible in each other's cases except the evidence of the one who is flogged in one of hudud cases or is experienced of tendering false evidence, or the evidence of the one who is doubted to be a relative or affiliated one. Almighty Allah knows the hidden secretes of His servants and has put a cover upon them in hudud except that becomes manifest through evidence or by oath*."[4]

When a dispute is brought to a court, a judge relies basically on two main sources of proof:

1: Production of evidences by the plaintiff; and

2: Oath of the defendant in case of non-availability of witnesses or due to their rejection by the court due to some legal reasons.

This principle has been derived from the following Hadith:

"Onus of proof (*al-bayyainah*) lies on the plaintiff and the oath is to be sworn by the defendant."[5]

However there are other sources of proof like confession / admission, circumstantial evidence, etc. Jurists have discussed all of them at length. Deciding on personal knowledge of a judge (*Ilm al-Qadi*) is one of the sources of

proof, however, opinions of jurists differ with regard to the extent to which it can be relied upon? The following discussion deals with this question.

Ilm al- Qadhi:

The personal knowledge of a judge is of various kinds:

1: Knowledge of a judge during his court timings:

When a judge gets knowledge during his official and court's time, while keeping regard of the prescribed process and procedure as enunciated by the jurist in the light of Islamic Law, all jurists are in consensus that in this case the judge is bound to decide accordingly. [6]

2: Knowledge of a judge outside his court:

If a matter comes to the knowledge of the judge outside his court, like he notices a person damaging property of another, or a person divorcing his wife, opinions of jurists differ with regard to whether or not he can use that knowledge to render judgment. According to Ibn Hazm, he is allowed to do so in all matters of civil and criminal nature. [7] He has based his opinion on the following Qura'nic verses:

"O ye who believe, stand out firmly for justice, as witness to Allah, even as against yourselves, or your parents, Or your kin, and whether it be (against) rich or poor: for Allah can protect both." [8]

"*We have sent down to thee the Book in Truth, that thou mightiest judge between men, as guided by Allah: so be not (thou) a pleader for treacherous*." [9]

Shafii jurists differentiate between the rights of Allah and the humans. When a matter relates to the rights of Allah, the preferred version is that he is not allowed to decide. They have based this opinion on the words of Abu-Bakr RA when he said that if I witness someone committing a crime liable for *hadd*, I will not impose penalty on him as it is better not to expose him, and because hudud can be nullified on the basis of doubt. [10] On the other hand, if a matter relates to the rights of humans, the preferred version is that he can decide on the basis of his personal knowledge." [11]

According to Maliki and Hanbali jurists, a judge cannot decide a case when he acquires knowledge outside of the court. [12] They have based their argument on the following tradition of the Prophet (PBUH): "*I am only a human being and you bring disputes to me, some perhaps being more eloquent in their plea than others, so that I give judgment on their behalf according to what I hear from them. Therefore, whatever I decide for anyone which rightly belongs to his brother, he must not take it, for I am granting him only a portion of the hell.* "[13]

According to Hanafi jurists, a judge can decide on the basis of his personal knowledge if a matter relates the rights of humans, however, he cannot decide in *hudud* cases except in theft where he can issue a decree for the

payment of the damage or stolen object, but cannot decide amputation of the hand. [14]

There is another view of the jurists which prohibits a judge from making decisions on the basis of his personal knowledge in the cases of hudud crimes, especially adultery. This view is based on the following verses of the Holy Quran:

"*Why did they not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars*." [15]

This also supported by the saying of the Prophet (PBUH) about a woman accused of li'an, because the child whom she gave birth later had great resemblance with the accused (adulterer) about whom the Prophet (PBUH) said: "*If I were allowed to stone to death without evidence, I would have stoned her."*[16]

Dr. Anwarullah says in this regard:

"This hadith states that the judge is prohibited from deciding according to his personal knowledge in case of adultery. This rule applies to all the hadd penalties and reflects the related precept of forgiveness. This view derives additional support from the Hadith: Doubts nullify *hudud*" [17]

He further says: "It is further supported by the sayings of Abu-Bakr RA: "If I saw someone making intercourse with someone, I will not implement *hadd* on (them) until there are witnesses." Thus, the judge's personal knowledge does not inspire confidence in the public but breeds doubt. The hudud are applied by the rulers as Allah's representative, without any other individual demanding them (i.e. a complaining witness) which might make the judge's motives suspicious when he has to rule on the basis of personal knowledge. Also, a *hadd* is nullified if the confessor retracts his confession, in which case the judge cannot inflict the fixed penalty upon him. Therefore, a *hadd* penalty may not be inflicted on the basis of the judge's personal knowledge if the confessor denies the confession. The followers of Shafii and Abu Hanifa, and the followers of Abu Yusuf and Muhammad Ibn al-Hasan all have adopted this view" [18]

Dr. Anwar al Allah has narrated the following narration which substantiates the opinion of those jurists who prohibit a judge from deciding on the basis of his personal knowledge in criminal or non-criminal cases.

Hazrat Umar wrote to Abu Musa al Ashari: "*The ruler (judge) should neither decide on the basis of his personal knowledge nor on weak presumption nor doubt*." [19]

Once, a party said to Qadi Shurayyh during hearing: *"Be our witness (as you have witnessed the incident)".* Qadi Shurayyh said to him, "*Go to Amir*

(ruler) so that he may appoint another qadi for this case, then I shall testify in your favor."[20]

Dr Abdul Karim Zaidan has given five reasons why a judge cannot decide on the basis of his personal knowledge;

1: There are two kinds of traditions, those which allow a judge to decide on the basis of his personal knowledge and those which prohibit him to do so. The latter are stronger.

2: The companions of the Prophet (PBUH) knew better the intents of Shariah than others and they have not permitted a judge to decide on the basis of his personal knowledge. In this regard many narrations can be quoted like when Hazrat Abu-Bakr said: *"If I witness someone committing a crime liable for hadd, I will not impose penalty on him as it is better not to expose him, and also because hudud can be repealed on the basis of doubts*" [21]

There is another narration which has been related on the authority of Ikrimah that once Hazrat Umar said to Abd al-Rahman Ibn Auf RA, "*If you were a ruler and I were a qadi, and I had seen a man making illicit sexual intercourse with a woman, or I had seen him committing theft, (*what would I have done?) Abd al- Rahman RA replied, "*Your evidence is like the evidence of any other man*." [22]

3: It is better to prohibit him to decide on the basis of his personal knowledge to dispel the impression of aspersion about the Qadhi. This is evident from the Seerah of the Prophet (PBUH) that although he knew the hypocrites but did not penalize them because in case of any harm or penalty it was quite possible that the enemies of Islam would have blamed him. The Prophet (PBUH) said: *"I do not give any harm to them (*although they were deserving it*) because the enemies will say that the Prophet (PBUH) is killing his own companions*."

4: Prohibiting a judge from deciding on the basis of his personal knowledge will close the doors of corruption. Imam Shafii said: "*If there were no corrupt judges I would permit them to decide on the basis of their personal knowledge.* [23]

While Ibn Abidin from Hanafi school of thought also says: "As a principle, the Hanafi jurists have allowed a judge to decide on the basis of his personal knowledge but the preferred version is prohibition to do so owing to corruption in our time." [24] The same opinion has been adopted by Ibn al-Hajar al-Asqalani. [24]

5: It is a general principle that any dispute brought to a court needs proper procedure like presentation of a lawsuit, its detailed examination, witnesses, response of the defendant etc. If a judge decides on the basis of his personal knowledge and hence does not follow the prescribed procedure, fear of injustice will prevail, which is why it is not appropriate to give decision on the

basis of personal knowledge. This is because a judge is like any other human being and it is quite possible that he has collected wrong or incomplete information about a case."[25]

Conclusion:

It is obvious from the above discussion that there are two kinds of rights: rights of Allah and rights of humans. In case of the former, a judge is not allowed to decide on the basis of his personal knowledge, particularly in *hudud* and *qisas* crimes. However, the jurists have allowed a judge to decide on his personal knowledge in ta'azir cases. Similar is the case of the rights of humans as they demand high degree of caution, and therefore it would not be appropriate to allow him to decide on the basis of his personal knowledge. Besides, empowering him to decide on the basis of his personal knowledge will lead to open the door of corruption.

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